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In re:) **APPEAL NO. BP-A092**
)
Appeal of Kalayaan, Inc.) **ITB 16-DOC-162-CNMI**
)
) **"Cancellation of DOC Food Service Solicitation"**
)

FACTUAL BACKGROUND

On September 9, 2016, the Director of Procurement and Supply ("the Director") and the Commissioner of the Department of Corrections solicited sealed bids for food services for the Department of Corrections ("the ITB").

In due course, Kalayaan, Inc. ("Kalayaan") and MJ Kitchenette & Catering ("Kitchenette") submitted sealed proposals in response to the solicitation. *Kalayaan Proposal*, (October 12, 2016); *MJ Kitchenette Proposal*, (October 10, 2016). On October 12, 2016, bids were opened and reviewed at the Division of Procurement and Supply ("P&S"). *Bid Opening Summary*, pp. 1-3 (October 12, 2016). The Department of Corrections ("DOC") selected Kalayaan as the lowest responsible bidder on October 18, 2016, and rejected Kitchenette's bid on multiple grounds. *Id.*

A cascade of bid protests and appeals followed the bidding and review process, spanning a period of over one year. Kitchenette first filed a protest based on DOC's concerns with its past performance as the incumbent contractor and its financial resources. *Kitchenette Protest*, pp. 1-4 (November 7, 2016). As a result, the Director vacated his decision rejecting Kitchenette's bid because DOC could not substantiate the alleged substandard performance by Kitchenette. *Director's Letter to Kitchenette re: Vacating Bid Rejection*, p. 1 (December 27, 2016). Next, Kalayaan filed a protest based on the Director's decision to re-open the bidding process and further alleging that Kitchenette's original bid was non-responsive in several enumerated criteria. *Kalayaan First Protest*, (January 9, 2017). Before the deciding the merits of Kalayaan's first protest, the Director denied Kitchenette's protest, finding them non-responsive for failure to provide the requested financial information. *Director's First Decision*, (January 18, 2017).

Kitchenette's first appeal to OPA followed, alleging the financial information requested by the Director had been provided to P&S in a timely manner. *Kitchenette's First Appeal*, (February 16, 2017). OPA ruled in favor of Kitchenette, finding the financial information had been timely submitted, but ordered the Director to decide the merits of Kalayaan's first protest prior to evaluating Kitchenette's financial statements. *In re: Appeal of MJ Kitchenette & Catering*, OPA Appeal No. BP-A090 (April 19, 2017).

On remand, the Director ruled in favor of Kalayaan's first protest, finding that Kitchenette's bid was not responsive on several grounds. *Director's Second Decision*, (May 15, 2017). Kitchenette responded with its second protest. *Kitchenette's Second Protest*, (May 30, 2017). Several months passed before the Director denied Kitchenette's second protest on August 17, 2017. *Director's Third Decision*, (August 17, 2017).

Kitchenette's second appeal to OPA followed, alleging the Director failed to consider the financial information provided by Kitchenette and that his confirmation of DOC's rejection of Kitchenette's bid was arbitrary and capricious. *Kitchenette's Second Appeal*, (August 31, 2017).

Prior to completion of the comment period for the Kitchenette's second appeal, DOC cancelled the ITB and requested concurrence from the Director. *DOC Letter to Director*, (October 6, 2017). The Director approved DOC's request to cancel the ITB. *Director's Letter to Interested Parties*, (October 12, 2017). In response, Kalayaan lodged its second protest, challenging the Director's approval of the cancellation of the ITB. *Kalayaan's Second Protest*, (October 26, 2017). The Director denied Kalayaan's second protest on October 30, 2017. *Director's Fourth Decision*. Kalayaan appealed the denial to OPA on November 14, 2017.

Following receipt of the present appeal, OPA notified the Director pursuant to NMIAC § 70-30.3-505(d)(1), requesting preparation of a report within ten (10) working days. *OPA Letter to Director Sablan*, (November 16, 2017). Despite multiple follow up attempts in the months that followed, no report was ever produced.

After OPA's follow up attempts, the matter went entirely dormant for approximately one year until Kalayaan, through its attorney, dispatched a letter requesting an update on the status of the report and appeal from OPA. *Kalayaan Letter to OPA Requesting Update*, (December 5, 2018). The letter further notified OPA of a new solicitation for food services for DOC, RFP 19-COR-019. *Id.* With this prompting, OPA renewed its efforts to procure the required report from the Division of Procurement and Supply. *OPA Letter to P&S re: Report for Kalayaan Second Appeal*, (December 13, 2018).

Unwilling or unable to produce a complete report due to an interim change in leadership, P&S did finally provide a copy of its administrative record in this matter to OPA on January 25, 2019. Finding this record sufficient to base its decision upon, OPA sent notice to all parties of its intent to construe the administrative record as the Director's report and solicited comments from interested parties pursuant to NMIAC § 70-30.3-505(d)(4). *OPA Letter to Interested Parties*, (January 28, 2019).

Kalayaan submitted comments on the Director's Report to OPA on February 7, 2019. *Comments by Kalayaan*, (February 7, 2019). Kalayaan distributed its comments to Kitchenette on February 11, 2019 and to the remaining interested parties on February 14, 2019. The comment period closed on February 22, 2019.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 70-30.3-505(a).

DISCUSSION

As the preceding background indicates, the present ITB has a prompted no less than four protests, two appeals, and over two years of litigation. Presently before OPA is whether its cancellation by DOC and approval by the Director was appropriate under the law. Kalayaan suggests it was arbitrary and capricious and not in the best interests of the government.

The Public Auditor will not interfere with an agency's corrective action, including the cancellation of a solicitation, unless there is evidence of fraud or a failure to follow applicable regulations. *In re: IP&E Saipan*, OPA Appeal No. BP-A084, p. 5-6 (March 31, 2014); *In re: Primtek Construction Company*, OPA Appeal No. BP-A068, p. 4 (June 19, 2012). Contracting officials enjoy broad discretion to take corrective actions regarding contracts and solicitations. *Id.* OPA will not "engage in second-guessing ... the necessity of the changes made to the specifications or scope." See *In re: Appeal of Reaction Co.*, OPA Appeal No. BP-A051, p. 6 (April 2, 2007).

OPA's position with respect to cancellation of solicitations is in line with the decisions of the Comptroller General of the United States. OPA commonly references GAO decisions for guidance purposes. The GAO's stance regarding the cancellation of a procurement is that cancellation is an agency decision which, if not made on the basis of bad faith or fraud, etc., rests squarely within the agency's discretion. In deciding whether to cancel a solicitation, a contracting officer has broad discretion and need only advance a reasonable basis for a decision to cancel a procurement solicitation. *Sunshine Kids Serv. Supply Co.*, B-292141, p. 2 (June 2, 2003). However, "where a protester has alleged that an agency's rationale for cancellation is but a pretext, that is, the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, [the GAO] will closely examine the bases for the agency's actions." *Superlative Techs., Inc.*, B-310489, B-310489.2, (Jan. 4, 2008). Notwithstanding such scrutiny, and even if it can be shown that pretext may have in part motivated the cancellation of the solicitation, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. *Centech Group, Inc.*, B-400585.2, B-400585.3, (Feb. 3, 2009).

Under CNMI law, procuring agencies enjoy wide discretion in canceling procurements prior to contract award. NMIAC § 70-30.3-240. In the present appeal, DOC, the procuring agency, advanced three enumerated reasons for cancelling the ITB: the specifications have been revised, the goods or services being procured are no longer required and, cancellation is in the best interest of the government. *DOC Letter to P&S re: Cancellation of ITB*, (October 6, 2017). The cancellation letter further justified the decision, stating the contract period was no longer desired due to DOC's plans to develop in-house food service capabilities, the long passage of time due to litigation and, the need to revise the content of the solicitation to ensure food service delivery is

compliant with the Eighth Amendment of the United States Constitution. *Id.* These justifications were approved by the Director and survived protest by Kalayaan. *P&S Letter to Interested Parties re: Cancellation of ITB*, (October 12, 2017); *Director's Fourth Decision*, (October 30, 2017).

Specification revisions are a specific, regulatory reason for the cancellation of a solicitation under CNMI procurement regulations, as is a change in the agency needs for goods or services being procured. NMIAC § 70-30.3-240(b)&(c). Ordinarily, OPA would accept reasonable justifications at face value absent and deny this appeal. However, because Kalayaan suggests the actions of DOC and concurrence by the Director are pretextual, OPA must closely examine the reasons set forth to justify the agency action.

Kalayaan argues the cancellation is a pretext to continue with the status quo, that is, to keep Kitchenette, the incumbent contractor, as its food service provider and avoid competition.¹ *Appeal*, p. 10 (November 14, 2017). To support this claim, Kalayaan advances several arguments to show the reasons set forth for the cancellation are implausible, irrational, and contrary to evidence before the agency. First, Kalayaan argues that cancellation of the ITB would not cure the alleged deficiency of compliance with the Eighth Amendment because the previous contract with the incumbent contractor did not contain any language additional to the ITB to ensure compliance with the Eighth Amendment. *Id.* at 8. Further, Kalayaan argues the lack of any exceptions in the food service delivery requirements of the ITB for emergency, is sufficient to ensure compliance with the Eighth Amendment. *Id.* Next, Kalayaan suggests there is no concrete evidence of DOC's plans to create an in-house food service program. *Id.* at 9. Interwoven into these arguments, Kalayaan suggests the history of cancellations of food services contract solicitations by DOC establishes a pattern of avoiding competition by extending the incumbent contractor between solicitation attempts. *Id.* at 7-11. Finally, in Kalayaan's comments on the Director's report, they argue the newly issued RFP 19-COR-019 further supports two of their pretext theories: that DOC has no intention of creating an in-house food services program and the Eighth Amendment justification was a farce. *Kalayaan Comment Letter*, p. 1 (February 7, 2018).

¹ OPA notes this theory is undermined by the fact that DOC had originally rejected Kitchenette's bid on the ITB due to their alleged history of poor performance.

An examination of RFP 19-COR-019, the recently issued solicitation for food services at DOC, which OPA hereby adopts as part of the record on this appeal, demonstrates DOC's cancellation of the ITB was an appropriate exercise of its discretion and not a pretext to avoid competition or favor the incumbent contractor. Comparing the cancelled ITB to RFP 19-COR-019 indicates several important changes, each of which support a change in DOC's perceived agency needs and the stated justifications for cancelling the ITB. First, the contract period has decreased two fold, from two years to one. Second, there is additional language inserted by DOC in RFP 19-COR-019 requiring the offeror to demonstrate "details on how it will maintain food services under adverse conditions such as a typhoon or extended power outage."

These changes appearing in RFP 19-COR-019 support DOC's stated justifications for cancellation of the ITB. The shortened duration of the contract period is a material change that would allow DOC more flexibility if it were to take active steps to create an in-house food service program. Additionally, the added language requires bidders to show capacity to continue services during natural disaster to ensure DOC can fulfill its constitutional obligations to its population. Either change to the specifications would justify DOC's decision to cancel the ITB. Furthermore, the form of the solicitation changed from an invitation to bid to a request for proposals, another material change by the procuring agency. It is within the procuring agency's discretion, provided it complies with the regulations, to select the appropriate manner of procuring goods and services.

Changes in specifications are an appropriate justification to cancel an invitation to bid. After close review of the justifications set forth by DOC and accepted by the Director, OPA finds the cancellation of ITB 16-DOC-162-CNMI was appropriate under the law.

DECISION

For the reasons set forth above, the appeal by Kalayaan is hereby denied.

Dated this 5th Day of March, 2019.

BY:



JOSEPH J. PRZYUSKI
OPA Legal Counsel

CONCUR:



MICHAEL PAI, CPA
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